



U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 20 1994

Stephen M. Soble, Esquire
Soble & Associates
P.O. Box 65337
Washington, D.C. 20036

Dear Mr. Soble:

This letter responds to your request on behalf of the Fuel Cell Commercialization Group ("FCCG") for a statement by the Department of Justice, pursuant to the Business Review Procedure, 28 C.F.R. § 50.6, of its enforcement intentions with respect to FCCG's planned activities to promote the development and commercialization of molten carbonate fuel cells ("MCFC").

FCCG, a cooperative research and development venture, is comprised principally of electric and gas utilities. At present, FCCG has 37 members that include a wide variety of electric and gas utility companies, municipal utilities, municipalities, regional utility organizations, and independent power producers from around the United States and Canada. FCCG is continuing to solicit members and will remain open to other members.

You have represented that FCCG was created as follows. A technology review, known as the "Notice of Market Opportunity" ("NOMO") Review, was undertaken in 1988 by the American Public Power Association ("APPA") in conjunction with the Electric Power Research Institute ("EPRI"). The NOMO Review Team issued public "Notices of Market Opportunity" to fuel cell developers world-wide, inviting them to submit competitive proposals describing their power plant technologies. The only proposal, of the five submitted, that met the objective criteria established for endorsement by the NOMO Review Team was submitted by the Energy Resource Corporation ("ERC"). ERC proposed to develop two-megawatt molten carbonate fuel cell power plants.

At the end of the NOMO competition, the NOMO Review Team and ERC drafted an outline of a proposed commercialization process, known as the "Principles and Framework for Commercializing Direct Fuel Cell Power Plants" ("commercialization plan"). This commercialization plan, which forms the basis for the collaborative research, development, and demonstration activities of the FCCG and ERC, is the subject of FCCG's business review request. FCCG will provide technical assistance to the ERC, a

manufacturer of carbonate fuel cells that is developing molten carbonate fuel cells as a clean and reliable alternate source of electrical power. Some members of FCCG have committed to contribute approximately \$21 million to be used by ERC in developing a demonstration unit to meet performance criteria established by FCCG.

The FCCG anticipates four stages to its commercialization plan. The design phase will involve the preparation of the design specifications and descriptive information necessary to describe in generic terms the MCFC power plant. The FCCG will use this information to inform other utilities of the advantages of MCFCs. The demonstration phase will involve the development, construction, and testing of a full scale demonstration power plant that satisfies performance criteria to be established by the FCCG. During this phase, ERC and the FCCG will work together to improve the power plant design and methods of operation. The early production phase will involve the construction and operation of 100 MW capacity (50 units) of pre-commercial early production units ("EPU"), at least 40 MW (20 units) of which will be purchased by FCCG members. The commercialization phase will involve the full scale production of two-MW MCFCs for sale at a mature market price of approximately \$1,000/KW. The commercialization plan calls for the first commercial units to come on line in 1998.

Each FCCG member has the right to purchase an EPU. However, the original 35 FCCG members that purchase EPUs have the right to receive a limited amount of royalty payments known as "purchase price adjustments" ("PPA") on ERC sales of commercial units. The PPA is meant to compensate purchasers for the risks associated with purchasing a not-yet commercial power plant at a price in excess of the commercial target price, and to attract a large volume of early purchase commitments. The amount of royalties will depend, in the aggregate, on the number of commercial units ERC sells, and will be capped at approximately 1.8 times the difference between the price paid for the EPU and the price charged by ERC for its commercial units.

The FCCG will coordinate the group's research and development contributions to ERC and will regularly publish and disseminate information concerning the benefits of MCFC power plants to electric utilities around the country. At all times, however, individual FCCG members will be acting for themselves in contributing to the cost of the demonstration unit and in placing contingent orders for ERC's MCFC power plants. The FCCG will limit its activities to tracking the placement of orders and drafting suggested contract provisions for members to use or revise as they see fit. FCCG members are free to engage in similar relationships with other fuel cell manufacturers, and the FCCG welcomes additional fuel cell manufacturers who are capable of meeting their objective criteria.

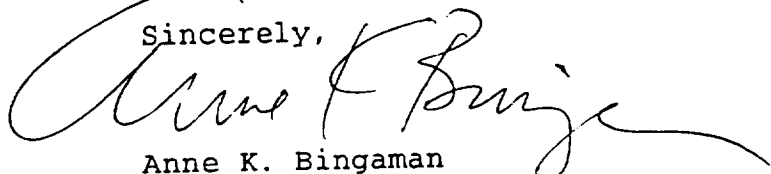
After careful consideration of the information and assurances that you have provided, the Department has concluded that it has no present intention of challenging the FCCG's proposed commercialization plan, as set out in this letter, on antitrust grounds. While the Department would be concerned if the effect of the proposed conduct were to increase the likelihood that the FCCG's members could successfully coordinate their interaction, such as by express or tacit collusion on pricing, the Department has concluded that the proposed program is unlikely to have such an effect. Actual or prospective members of the FCCG generally do not compete for residential or commercial customers, and even where they do, their limited cooperation in the FCCG would not facilitate collusion in utility markets. The FCCG commercialization program does not limit other utilities' access to the resultant fuel cell power plants. The fact that FCCG will have a limited lifespan of 5 to 8 years, would further indicate that no unreasonable competitive advantage will be conferred on its members. Finally, since the FCCG members are not precluded from participating in other programs relating to the development of fuel cell technology, and some are, in fact, doing so, competition for research and development of such technology would not be significantly affected.

The commercialization plan could have a procompetitive effect. If implemented, the plan may accelerate research and development in the design, production and marketing of more energy efficient and environmentally sound electrical power generation plants and may increase and enhance competition generally in the electricity generation market.

This letter only expresses the Department's current enforcement intention. In accordance with our normal practices, the Department remains free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest if actual operation of any aspect of this commercialization plan proves anticompetitive in purpose or effect.

This statement of the Department's enforcement intentions is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this letter will be made available to the public within 30 days of the date of this letter unless you request that part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

A handwritten signature in black ink, appearing to read "Anne K. Bingaman", with a long, sweeping horizontal line extending to the right.

Anne K. Bingaman
Assistant Attorney General